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LEGAL TECHNIQUES FOR PROTECTING FREE DISCUSSION IN WARTIME

THE encouragement of free speech by constitutional guarantees stems from a belief that active public discussion will provide the most favorable opportunities for individual development and the evaluation of public policy. In a wartime democracy the preservation of free speech comes into conflict with military needs and nationalist pressure for conformity. Prosecution of a modern war requires specific controls to protect military information, recruiting and morale. But regulations may be extended to forbid any opposition to the war or any criticism of its administration; and such a policy has serious disadvantages. Continued vigorous criticism of the administration of military and economic affairs is indispensable to the efficient prosecution of the war. Preservation of the critical attitude is even more essential for solving the problems of the peace. A plan for future world economic and political organization can only be formulated and secure popular acceptance

by extensive preliminary public discussion. A long period of stringently enforced national unity may leave the stamp of uninquiring conformism on the mind of the country.[1] Moreover, broad restrictions have been increasingly recognized as not only a limitation on individual rights, but also as a deprivation of the public's interest in hearing and evaluating ideas.[2] Although the ultimate success of a national policy of maintaining free discussion in wartime must depend upon public tolerance,[3] the policy can only be carried out by the development of appropriate legal techniques.

Scope of Free Speech

Control of discussion in wartime is primarily concerned with several recurring problems. Direct advice to resist military orders or imminent induction into service is always a proscribed activity; but few such prosecutions appeared in the last war.[4] The expression of moral disapproval for all war is certain to continue, chiefly within the ranks of the pacifist religious sects. In the World War, both pacifists and those who expressed respect for such beliefs were occasionally punished.[5] Yet pacifism is unlikely to impede the military effort, and preservation of respect for this small minority may well serve as a safeguard against the permanent militarization of the nation. Isolated outbursts of outright sympathy for the enemy are even less likely to hinder any military activity, but public expression of such opinions may cause breaches of the peace by vigilante groups. In a long war, governmental repression of such direct denials of national unity is likely. The inevitable attacks upon the justice of the war comprised the largest group of convictions in the last war, although occasional dicta upheld the right to advocate peace.[6] Several prosecutions also punished any disparagement of associated

1. See Morison and Commager, The Growth of the American Republic (1937) 476.

2. See Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 301–05 (1941) (dissenting opinion); Thornhill v. Alabama, 310 U. S. 88, 95–98 (1940); Whitney v. California, 274 U. S. 357, 375–77 (1927) (concurring opinion); Chafee, Free Speech in the United States (1941) 33, 188, 509.

3. *Cf.* The Federalist, No. 84 (Hamilton) on the freedom of the press. "Its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government."

4. See notes 33 and 35 *infra*.

5. On pacifist opinion, see United States v. Stephens, Interpretation of War Statutes (U. S. Dep't of Just.), Bulletin No. 116 (D. Del. 1918) (hereafter cited by bulletin number only); *cf.* convictions of pacifist ministers cited in note 33 *infra*. Several leading cases punished expressions of respect for conscientious objectors. Caldwell v. United States, 256 Fed. 805 (C. C. A. 1st, 1919), *cert. denied*, 250 U. S. 661 (1919); Masses Publishing Co. v. Patten, 246 Fed. 24 (C. C. A. 2d, 1917); see Debs v. United States, 249 U. S. 211 (1919).

6. See United States v. Debs, Bulletin No. 155 at 12 (N. D. Ohio 1918), *aff'd*, 249 U. S. 211 (1919); United States v. Prieth, Bulletin No. 156 at 17 (D. N. J. 1918).

nations.[7] Yet some discussion of the causes of the war, and of the policies of other countries, is necessarily involved in clarifying the future position of this nation in the world. The present English experience indicates that such speech can sometimes be harmless to the military effort of a united nation.[8] Moreover, such attacks upon the war, together with vague threats of revolution, usually come from local radical groups. The repression of such groups will increase discontent, while a conciliatory policy based on improving standards of living may draw them into the war effort. Finally, even necessary criticism of the government's administrative policies may sometimes be treated as disloyal.

In controlling various types of discussion, the attitude of those administering the machinery is more important than any constitutional or statutory formula. The experience of the last war suggests that a determined spirit of repression is not hampered by forms of judicial procedure. Some judges delivered speeches from the bench attacking the views of the accused and demanding summary treatment of traitors.[9] Juries often returned verdicts against any manifestation of disloyalty.[10] An army of 250,000 resourceful private informers was enrolled to listen everywhere.[11] Moreover, the real

7. See United States v. "The Spirit of '76", 252 Fed. 946 (S. D. Cal. 1917) (confiscation of motion picture about American Revolution); *cf.* Mead v. United States, 257 Fed. 639 (C. C. A. 9th, 1919). *Contra:* United States v. Curran, Bulletin No. 140 at 2 (S. D. N. Y. 1918).

8. In England the Communist Party's *Daily Worker* was allowed to propagandize against the war for over a year during the war. The Independent Labor Party has maintained a position in favor of a negotiated peace, and recently contested a by-election on this issue. For a review of English defense regulations, see Carr, *Crisis Legislation in Britain* (1940) 40 COL. L. REV. 1309.

9. The classic example is United States v. Stokes, Bulletin No. 106 (W. D. Mo. 1918), *rev'd*, 264 Fed. 18 (C. C. A. 8th, 1920) (judge's charge to the jury included long attack on defendant's Communist sympathies). See also United States v. "The Spirit of '76", 252 Fed. 946 (S. D. Cal. 1917); Jeffersonian Publishing Co. v. West, 245 Fed. 585 (S. D. Ga. 1917); United States v. Windmueller, Bulletin No. 112 (D. Alaska 1918); United States v. Taubert, Bulletin No. 108 (D. N. H. 1918). For an extreme example of a manipulated trial see Johnson, *The Conviction of Townley* (1919) 20 NEW REPUBLIC 18.

10. See CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) 70–73. For judicial warnings against the readiness of juries to convict for lack of patriotism see Wolf v. United States, 259 Fed. 388, 394 (C. C. A. 8th, 1919); United States v. Sandvick, Bulletin No. 113 at 9 (D. Alaska 1918). For an effective jury charge, emphasizing the importance of fairness, see United States v. Brinton, Bulletin No. 132 (D. N. D. 1918). During the sedition prosecutions by unpopular governments in the eighteenth century, jury control with a general verdict provided an effective safeguard for free speech; but in a united nation the juries reflect popular prejudice against any opposition.

11. See 2 BEARD AND BEARD, THE RISE OF AMERICAN CIVILIZATION (1935) 642. This American Protective League operated with the approval and supervision of the Department of Justice. See REP. ATT'Y GEN. (1918) 15. For an example of their activities in trying to "get something on" a person suspected of disloyalty, see MOCK, CENSORSHIP 1917 (1941) 208.

limits of free discussion were in fact determined by the federal and state district attorneys, since these officials retained autonomy in deciding what to prosecute.[12] The extremes to which repression of speech was thus carried during the last war have been generally condemned.[13] In the present war the announced national policy[14] is to maintain an atmosphere favorable to free discussion by confining restrictions to speech which will immediately obstruct the military effort. All federal prosecutions must now be approved in advance by the Department of Justice,[15] and in dismissing several prosecutions for casual disloyal remarks,[16] the Department has already adopted a liberal policy which reflects the present tolerant attitude of public opinion.

The current national policy of protecting free discussion in wartime may be implemented by the recent rigorous constitutional tests protecting freedom of speech, and by strict construction of restrictive statutes. While military activities may be insulated against obstruction resulting from speech, the exercise of the war power is always said to be subject to constitutional limitations.[17] The controversy has centered about the proper formula to indicate what causal relation between speech and the proscribed evils will justify restriction of speech. The loose World War test of "tendency" has been replaced by the "clear and present danger" rule,[18] and the substitution has provided an opportunity for sympathetic judges to protect a wider area of free discussion. The requirement of an immediate danger has served to invalidate restrictions designed to prevent evils arising only after a lapse of time.[19] Moreover, under this test, the defendant must be shown to have

12. An order of Oct., 1917, required prior authorization from the Dep't of Justice before any indictments for treason were brought, and requested information on all prosecutions under the Espionage Act. See REP. ATT'Y GEN. (1918) 673. After Nov. 1, 1918, prior authorization was required for all prosecutions involving criticism of the war. See *Id.* at 674.

13. See address by Wendell Berge, Chief of the Criminal Division of the U. S. Dep't of Justice, Jan. 11, 1942, reprinted in 88 Cong. Rec. at app. 115 (1942); interview with Att'y Gen. Francis Biddle, N. Y. Times, Sept. 21, 1941, § vii, p. 8, cols. 3-4; 2 BEARD AND BEARD, THE RISE OF AMERICAN CIVILIZATION (1935) 640-43; 2 MORISON AND COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC (1937) 478-79. No sedition prosecutions were brought in Massachusetts during the last war and apparently no harm resulted to the military effort. See CHAFEE, *op. cit. supra* note 10, at 60.

14. Described in two addresses by Wendell Berge, Chief of the Criminal Division of the U. S. Dep't of Justice, Dec. 14, 1941, and Jan. 11, 1942, 88 Cong. Rec. at app. 115 (1942); see speech by President Roosevelt, N. Y. Times, Dec. 16, 1941, p. 30, col. 6.

15. See Dep't of Just. Release, Dec. 16, 1941.

16. See Dep't of Just. Release, Dec. 21, 1941.

17. *Ex parte* Milligan, 4 Wall. 2, 120-21 (U. S. 1866); see United States v. Cohen Grocery Co., 255 U. S. 81, 88 (1921); REP. ATT'Y GEN. (1918) 20.

18. See Bridges v. California, 62 Sup. Ct. 190, 194 (1941); Wechsler, *Symposium on Civil Liberties* (1941) 9 AMER. L. SCHOOL REV. 881.

19. Herndon v. Lowry, 301 U. S. 242 (1937); see Mr. Justice Brandeis, concurring in Whitney v. California, 274 U. S. 357, 377 (1927). *Cf.* Comment (1940) 28 CALIF. L. REV. 733, 738-40.

participated directly in proscribed speech;[20] and, if a statute's wording is so broad as also to forbid admittedly proper discussion, it may be held invalid on its face.[21] Finally, a presumption favorable to free speech has been developed,[22] so that the likelihood of trivial evils has often been held not to justify limitations on discussion.[23] However, the broad language of the *Gobitis* case[24] may be interpreted as restoring the presumption of statutory validity whenever the interest of national unity is involved.

Within the framework of these minimum guarantees, wartime control of discussion will be based on a limited number of powers. The traditional limitation of the power of summary arrest and internment to a zone of immediate military emergency may militate against its use; but if the authority is invoked, courts are unlikely to interfere.[25] The most important federal restrictions on free speech are derived from three sections of the still effective 1917 Espionage Act.[26] Its provision against false reports or statements made to interfere with the operation or success of the military forces was apparently intended to prevent false rumors about troop movements.[27] But in the last

20. See DeJonge v. Oregon, 299 U. S. 353 (1937); Herndon v. Lowry, 301 U. S. 242 (1937); Fiske v. Kansas, 274 U. S. 380 (1927); Whitney v. California, 274 U. S. 357 (1927); (1932) 45 HARV. L. REV. 927; *cf.* O'Brian, *Civil Liberty in War Time* (1919) 42 PROC. N. Y. STATE BAR ASS'N 275, 296.

21. Thornhill v. Alabama, 310 U. S. 88, 96–98 (1940); Lovell v. City of Griffin, 303 U. S. 444 (1938); Stromberg v. California, 283 U. S. 359 (1931); State v. Diamond, 27 N. M. 477, 202 Pac. 988 (1921).

22. See Hamilton and Braden, *The Special Competence of the Supreme Court* (1941) 50 YALE L. J. 1319, 1349; Schneider v. State, 308 U. S. 147, 161 (1939), (1940) 40 COL. L. REV. 531; United States v. Carolene Products Co., 304 U. S. 144, 152, n. 4 (1938).

23. Schneider v. State, 308 U. S. 147 (1939) (littering of streets insufficient to justify prohibiting distribution of handbills); Near v. Minnesota, 283 U. S. 697 (1931) (scandalous newspaper insufficient to allow censorship). And see Mr. Justice Brandeis, concurring in Whitney v. California, 274 U. S. 357, 377 (1927).

24. Minersville School Dist. v. Gobitis, 310 U. S. 586 (1940).

25. "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." *Ex parte* Milligan, 4 Wall. 2, 127 (U. S. 1866). Yet this decision came after the Civil War, and during the war the Supreme Court had refused to intervene in a similar case, *Ex parte* Vallandigham, 1 Wall. 243 (U. S. 1863). See also Sterling v. Constantin, 287 U. S. 378 (1932). Yet, apart from any land fighting, large areas of the country may possibly be declared zones of conflict and put under martial law. Presumably an executive proclamation is necessary to accomplish this. But see United States *ex rel.* Wessels v. MacDonald, 265 Fed. 754, 763–64 (E. D. N. Y. 1920), *app. dismissed,* 256 U. S. 705 (1921) (*cf.* note 131 *infra*). In Canada persons may be interned without trial on the order of any Minister. See Brewin, *Civil Liberties in Canada during Wartime* (1941) 1 BILL OF RIGHTS REVIEW 112, 115–21.

26. 40 STAT. 219 (1917), 50 U. S. C. § 33 (1940).

27. Masses Publishing Co. v. Patten, 244 Fed. 535 (S. D. N. Y. 1917), *rev'd on other grounds,* 246 Fed. 24 (C. C. A. 2d, 1917); see United States v. Brinton, Bulletin No. 132 at 3 (D. N. D. 1918). In a long Congressional debate, largely devoted to a

war it was broadly construed to allow courts to pass on the truth of controversial opinions about the war,[28] and to punish criticism of the administration of the civilian auxiliaries providing food and medical aid.[29] Because voluntary recruiting was much emphasized in the last war, another section of the Act forbade obstruction of enlistments. Since enlistment often involved a delicate balancing of family ties against patriotism,[30] it was frequently held under this clause that any criticism of the war effort might influence such a decision.[31] However, under present national policy a comprehensive system of selective service has replaced voluntary enlistment as the preferred method for allocating men to the military forces.[32] And many judges would probably hold that only a more direct argument would be likely to cause men to resist the draft. Any obstruction of military recruiting can now be covered by the provision in the 1940 draft act against advice to resist the draft.[33] If the clause protecting enlistments is superseded by this clause protecting the draft, the most serious existing federal threat to free discussion will be removed.

The third provision in the Espionage Act, and a similar clause in the Alien Registration Act of 1940,[34] forbid any speech causing insubordination, dis-

provision for newspaper censorship and to the imminent shortage of tin cans, the sedition section of the Espionage Act was only mentioned four times, and was never discussed. Yet one Congressman made a casual reference which assumed that this clause was thus restricted. 55 CONG. REC. 3137 (1917). While this interpretation seems clearly correct, there are no reported opinions to show its application. A fairly strict construction of this clause was indicated in the dismissal of prosecutions at the start of the present war. See Dep't of Just. Release, Dec. 21, 1941.

28. Pierce v. United States, 252 U. S. 239 (1920) (one of several cases involving statements that the war was to protect the Morgan loans, with the usual refutation by introducing the President's war message to Congress); United States v. Stephens, Bulletin No. 116 (D. Del. 1918) (statement that war is murder).

29. United States v. Nagler, 252 Fed. 217 (W. D. Wis. 1918), *rev'd on confession of error,* 254 U. S. 661 (1920) (abuse of the Red Cross); see Pierce v. United States, 252 U. S. 239, 246 (1920); Kirchner v. United States, 255 Fed. 301, 303 (C. C. A. 4th, 1918), *app. dismissed,* 250 U. S. 678 (1919) (broad dictum practically includes in military forces all persons involved in supplying army). *Contra:* United States v. Koenig, Bulletin No. 166 (E. D. Mo. 1918).

30. See United States v. Nearing, Bulletin No. 192 at 14 (S. D. N. Y. 1918).

31. See United States v. Equi, Bulletin No. 172 at 11, 21 (D. Ore. 1918), *conviction aff'd,* 261 Fed. 53 (C. C. A. 9th, 1919), *cert. denied,* 251 U. S. 560 (1920).

32. For speeches by Gen'l Hershey, National Director of Selective Service, urging that all volunteering should be abolished, see N. Y. Times, Dec. 22, 1941, p. 10, col. 4, and Jan. 20, 1942, p. 21, cols. 2-3.

33. 54 STAT. 894, 50 U. S. C. A. app. § 311 (Supp. 1940). There were few prosecutions for direct appeals to resist the World War draft. For such cases involving religious pacifism see United States v. Graham, Bulletin No. 120 (E. D. Tenn. 1918); United States v. Waldron, Bulletin No. 79 (D. Vt. 1918); *cf.* State v. Whittaker (Cal. Police Ct. 1917) in NELLES, ESPIONAGE ACT CASES (1918) 53. And see Schenck v. United States, 249 U. S. 47 (1919).

34. 54 STAT. 670, 18 U. S. C. § 9 (1940). This section continues in effect in peace time.

loyalty, mutiny, or refusal of duty in the military forces. On its face this section would seem designed to ensure obedience by those in military service. Yet in the World War its use to develop a technique for protecting military morale was overlooked in the preoccupation with suppressing minority opinion. A few cases involved direct appeals for refusal to perform a military duty;[35] but this section was practically converted into a general statute against disloyalty, over the protest of only a few judges.[36] Since the 1917 draft act contained no clause forbidding dissuasion,[37] this provision in the Espionage Act was usually extended to cover all who registered for the draft;[38] and, by invoking the Spanish War statute declaring all men between 18 and 45 to be members of the "national forces,"[39] the group protected was frequently expanded to include half the male population.[40] A few dicta even suggested that critical ideas were equally dangerous if they reached the family or friends of anyone in the military forces.[41] The statutory requirement of an intent to cause the proscribed results was assimilated to the loose objective tests by a presumption of constructive intent from the "natural consequences" of actions.[42] Moreover, some serious procedural abuses were evident. Repetitious counts bristling with sinister adverbs were likely to confuse the jury;[43] and the introduction of any disloyal remarks made in

35. See Rutherford v. United States, 258 Fed. 855 (C. C. A. 2d, 1919). See also the more frequent appeals to resist the draft, note 33 *supra*.

36. Masses Publishing Co. v. Patten, 244 Fed. 535 (S. D. N. Y. 1917) (Learned Hand, J.), the first and most thoughtful opinion in all the World War prosecutions, *rev'd*, 246 Fed. 24 (C. C. A. 2d, 1917); Wolf v. United States, 259 Fed. 388 (C. C. A. 8th, 1919); United States v. Schutte, 252 Fed. 212 (D. N. D. 1918); United States v. Hall, 248 Fed. 150 (D. Mont. 1918); United States v. Nearing, Bulletin No. 192 at 6–7 (S. D. N. Y. 1918); United States v. Henning, Bulletin No. 184 (E. D. Wis. 1918).

37. The provision [40 STAT. 81 (1917)] only forbade aiding a person to evade the act.

38. Anderson v. United States, 264 Fed. 75, 77 (C. C. A. 8th, 1920), *cert. denied*, 253 U. S. 495 (1920); see Debs v. United States, 249 U. S. 211, 216–17 (1919).

39. 30 STAT. 361 (1898) (defining those potentially liable for military duty). This confusion was analyzed at length in United States v. Henning, Bulletin No. 184 at 7–11 (E. D. Wis. 1918).

40. United States v. Wishek, Bulletin No. 153 at 2 (D. N. D. 1918); *cf.* United States v. Denson, Bulletin No. 142 at 4 (N. D. Ala. 1918); United States v. Goldsmith, Bulletin No. 133 at 2–3 (N. D. Ala. 1918).

41. See United States v. Binder, Bulletin No. 126 at 4 (E. D. N. Y. 1918); United States v. Weinsberg, Bulletin No. 123 at 7 (E. D. Mo. 1918). *Contra:* Dickson v. United States, 278 Fed. 728 (C. C. A. 8th, 1921).

42. United States v. Goldsmith, Bulletin No. 133 at 7 (N. D. Ala. 1918). For a criticism of the application of this maxim, see United States v. Brinton, Bulletin No. 133 at 7–8 (D. N. D. 1918), where the judge pointed out that if a jury strongly disliked any language, they would be certain to presume that its utterance would bring harm. See also CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) 118–21, 186.

43. See United States v. Hicks, Bulletin No. 160 (W. D. Okla. 1918). *Cf.* under the Sedition Act of 1918 (40 STAT. 553) (see note 57 *infra*). United States v. Brackett, Bulletin No. 170 (E. D. Mo. 1918) (verdict directed for the defendant on thirty-five of forty-six counts).

past years, as evidence of a probable present intent, could only have had a prejudicial effect.[44] While indictments usually specified the exact language used,[45] a few convictions were upheld because of the general tenor of a speech.[46] Occasionally the circumstances were not alleged,[47] and a serious analysis of how they would bring about the proscribed evils was rarely attempted. Some courts presumed that the speech would be repeated so as to cause harm,[48] and at least two courts accepted the broad metaphor that danger could be forestalled when the seed was being sown.[49] Under this approach, a few prosecutions were instituted against any trivial remarks that indicated a disloyal attitude.[50] In this climate of opinion, perfunctory judicial warnings to be fair could have but little effect. Yet in some cases judges insisted upon some proof of likely harm,[51] and a few adopted a presumption that defendant's words would not be repeated by others.[52] Where the evi-

44. See Hall v. United States, 256 Fed. 748, 750 (C. C. A. 4th, 1919); Grubl v. United States, 264 Fed. 44 (C. C. A. 8th, 1920); Stokes v. United States, Bulletin No. 106 (W. D. Mo. 1918); *rev'd*, 264 Fed. 18 (C. C. A. 8th, 1920); Kammann v. United States, 259 Fed. 192, 194–95 (C. C. A. 7th, 1919) (pro-German remarks before the war); United States v. Hicks, Bulletin No. 160 at 11 (W. D. Okla. 1918) (previous convict record).

45. But *cf.* State v. Wolf, 56 Mont. 493, 185 Pac. 556 (1919).

46. See State v. Holm, 139 Minn. 267, 272, 166 N. W. 181, 182 (1918). Compare Learned Hand, J., in Masses Publishing Co. v. Patten, 244 Fed. 535, 543 (S. D. N. Y. 1917), *rev'd on other grounds*, 246 Fed. 24 (C. C. A. 2d, 1917): "The tradition of English-speaking freedom has depended in no small part upon the merely procedural requirement that the state point with exactness to just that conduct which violates the law."

47. United States v. Schutte, 252 Fed. 212 (D. N. D. 1918); Shilter v. United States, 257 Fed. 724 (C. C. A. 9th, 1919); *cf.*, under the Act of 1918 (40 STAT. 553), Dierkes v. United States, 274 Fed. 75 (C. C. A. 6th, 1921), *cert. denied*, 257 U. S. 646 (1921).

48. White v. United States, 263 Fed. 17 (C. C. A. 6th, 1920), *cert. denied*, 253 U. S. 496 (1920) (ideas would spread through the community, and reach soldiers); *cf.* Frohwerk v. United States, 249 U. S. 204 (1919).

49. See Krafft v. United States, 249 Fed. 919, 925 (C. C. A. 3d, 1918); United States v. Equi, Bulletin No. 172 at 9 (D. Ore. 1918), *conviction aff'd*, 261 Fed. 53 (C. C. A. 9th, 1919), *cert. denied*, 251 U. S. 560 (1920). *Cf.* Gitlow v. New York, 268 U. S. 652, 669 (1925).

50. In Von Bank v. United States, 253 Fed. 641 (C. C. A. 8th, 1918), the president of a school district was convicted of causing disloyalty in the military forces by refusing to raise the flag, with the remark that "he would just as soon see a pair of old trousers hanging over the schoolhouse." Compare Abrams v. United States, 250 U. S. 616, 628 (1919), described in the dissenting opinion of Mr. Justice Holmes as "the surreptitious publishing of a silly leaflet by an unknown man."

51. A few cases were reversed or dismissed because the indictment failed to indicate when or to whom the words were spoken. "The circumstances are an element of the crime." United States v. Schutte, 252 Fed. 212, 214 (D. N. D. 1918); Fontana v. United States, 262 Fed. 283 (C. C. A. 8th, 1919).

52. Kammann v. United States, 259 Fed. 192 (C. C. A. 7th, 1919) (discussion of the background of the war with a grammar-school class); United States v. Hall,

dence clearly showed that the remarks were passed in private conversation between civilians, convictions were reversed on appeal.[53] And when private committees demanded an explanation for a passive refusal to support the war, such as a failure to buy liberty bonds or to contribute to the Red Cross, the replies were uniformly held privileged.[54] Nevertheless, the experience of the last war indicates that, in an excited atmosphere, the Espionage Act can be used to repress almost any criticism concerning the war effort.

But this can be avoided in the present war if the recent stricter constitutional tests are applied in construing this statute. Prosecutions should be instituted only in cases of actual danger, and the defendant's intent need not be emphasized. The language actually used should be set forth in a simply phrased indictment, and a detailed allegation of the circumstances should specify any facts indicating a likelihood that the language would be repeated to and would influence soldiers. Thus limited, the Espionage Act may be used to prevent serious and immediate threats to military morale, without imperiling freedom of civilian discussion.

The application of these standards may be tested soon in an appeal by the Trotskyist trade union leaders convicted of sedition in Minneapolis.[55] The primary issue involved a conspiracy to overthrow the government, but scattered evidence of a program of military disaffection was pieced together from their propaganda of several years. Passages in their literature expressed opposition to any capitalist war. In a few instances the leaders advised their members entering the army to demand better living standards, and once they recommended seeking new members among other soldiers. If such activity is proscribed, agitation for military reform must be restricted within very narrow limits. Yet the trial judge refused motions for a directed verdict and requests for jury charges that were based on the clear and present danger test.[56] If this conviction is reversed for lack of evidence to go to

248 Fed. 150 (D. Mont. 1918); United States v. Koenig, Bulletin No. 166 (E. D. Mo. 1918) (argument with a Red Cross solicitor).

53. These cases included private conversation at home with neighbors, Erhardt v. United States, 268 Fed. 326 (C. C. A. 7th, 1920); or overheard by neighbors, State v. Rempel, 143 Minn. 50, 172 N. W. 888 (1919); or to strangers on a farm, Grubl v. United States, 264 Fed. 44 (C. C. A. 8th, 1920); Harshfield v. United States, 260 Fed. 659 (C. C. A. 8th, 1919); State v. Deike, 143 Minn. 23, 172 N. W. 777 (1919); or in a boarding house, United States v. Denson, Bulletin No. 142 (N. D. Ala. 1918) (result not reported); or in a train, Sandberg v. United States, 257 Fed. 643 (C. C. A. 9th, 1919). But *cf.* note 59 *infra.*

54. United States v. Pape, 253 Fed. 270 (S. D. Ill. 1918); *cf.* State v. Ludemann, 143 Minn. 126, 172 N. W. 887 (1919); Gerdes v. State, 104 Nebr. 35, 175 N. W. 606, 1023 (1919). But *cf.* note 29 *supra.*

55. United States v. Dunne, U. S. Dist. Ct. of Minn., Dec. 8, 1941.

56. The judge followed Gitlow v. New York, 268 U. S. 652 (1925), which has been undermined by Herndon v. Lowry, 301 U. S. 242 (1937). See note 19 *supra.* But the jury acquitted the defendants on the principal count, which charged a conspiracy to overthrow the government with an overt act, the formation of a union defense guard

the jury, the court's ruling on the application of the present danger standard to military disaffection will set a strong precedent to protect civilian discussion about military affairs in the present war.

While a literal construction of the Draft and Espionage Acts is thus sufficient to protect military recruiting and morale, public demands for enforced national unity may again bring the passage of broader sedition statutes.[57] Congress may have constitutional power expressly to require full civilian support of the war.[58] But the experience of the World War suggests that, in the atmosphere which brought their passage, broader sedition statutes will be extended to forbid harmless remarks and constructive criticism as well. If Congress should again forbid any manifestation of disloyalty during the war, the constant examination of the subjective intent behind speech, regardless of the circumstances, will make it very difficult to maintain an atmosphere favorable to free discussion.[59] Similarly statutory prohibitions of abuse of the American form of government may[60] or may not[61] be interpreted to prevent criticism of all existing officials; but any vigorous denunciation of existing evils, such as an attack on prison brutality,[62] may be held

three years before and the purchase of four guns. The conviction on the other count involving revolution and military disaffection may thus be reversible for lack of a clear and present danger of revolution. See Stromberg v. California, 283 U. S. 359 (1931).

57. In reaction against a decision strictly construing the Espionage Act [United States v. Hall, 248 Fed. 150 (D. Mont. 1918)], Montana and the United States Congress passed broader sedition laws forbidding any expression of sympathy for the enemy, encouragement of resistance to the United States, and abuse of the American form of government or army or flag. MONT. LAWS EXTRA SESS. 1918, c. 11; 40 STAT. 553 (1918). The Department of Justice has recently indicated its view that this law "fortunately was repealed" after the war. See address by Wendell Berge, Chief of the Criminal Division of the Dep't of Justice, Jan. 11, 1942, reprinted in 88 Cong. Rec. at app. 116 (1942). For similar state statutes now in effect, see note 82 *infra*. If, as is frequently suggested, such statutes are really necessary to provide protective custody against vigilante violence, twenty-year penal sentences need not be provided. *Cf.* 2 HOLMES-POLLOCK LETTERS (1941) 31.

58. See Minersville School Dist. v. Gobitis, 310 U. S. 586 (1940); Gilbert v. Minnesota, 254 U. S. 325, 336 (1920) (dissenting opinion).

59. The Sedition Act of 1918 (40 STAT. 553) thus punished expressions of disloyalty regardless of the circumstances, including those made in private homes. Buessel v. United States, Bulletin No. 131 (D. Conn. 1918), *aff'd*, 258 Fed. 811 (C. C. A. 2d, 1919); see Albers v. United States, 263 Fed. 27 (C. C. A. 9th, 1920) (on a train), *rev'd on confession of error*, 256 U. S. 706 (1921); and *cf.* note 53 *supra*. For an example of the work of private informers that was encouraged under this act, see Schoborg v. United States, 264 Fed. 1 (C. C. A. 6th, 1920), *cert. denied*, 253 U. S. 494 (1920) (installation of a dictograph in a German cobbler's shop).

60. See Abrams v. United States, 250 U. S. 616, 623-24 (1919).

61. Stokes v. United States, 264 Fed. 18 (C. C. A. 8th, 1920); United States v. Ault, 263 Fed. 800, 811 (W. D. Wash. 1920). Evidently Congress intended that this should be explicitly understood. See speech by Senator Borah, 56 CONG. REC. 4629 (1918).

62. United States v. Steene, 263 Fed. 130 (N. D. N. Y. 1920), *rev'd on confession of error*, 255 U. S. 580 (1921).

necessarily to reflect upon the form of government. Statutory prohibitions against abuse of the military forces may be held to forbid criticism of the military leaders, or of any soldier's actions.[63] In a recent case[64] a statute which attempted to restrict Nazi propaganda fostering disunity, by forbidding promotion of hostility against any racial or religious group, was held unconstitutional for vagueness. The court felt that it was impossible to ascertain when a subjective emotion like hostility or abuse is caused. Moreover, older federal and state statutes forbidding advocacy of violent revolution[65] are of little use against the subtler fascist propaganda. These acts have been invoked fitfully against radical economic protest;[66] yet their application has been constitutionally restricted to a danger of revolution in the near future.[67] Moreover, the clauses punishing membership or affiliation with such revolutionary groups,[68] without further proof of personal advocacy, may be unconstitutional.[69] Finally, the broadest provisions in many state acts, such as those against encouraging any resistance to government or its officials,[70] are so clearly restrictive of proper discussion that they normally would be declared unconstitutional on their face.

In addition to the safeguards against widespread prosecution to punish discussion, the Department of Justice has announced an affirmative policy of

63. United States v. Vevig, Bulletin No. 162 (D. Alaska 1918); State v. Spartz, 140 Minn. 203, 167 N. W. 547 (1918). But *cf.* 56 CONG. REC. 6040 (1918).

64. State v. Klapprott, 22 A. (2d) 877, 881–82 (N. J. Sup. Ct. 1941).

65. Two federal conspiracy statutes dating from the Civil War contain prohibitions against inciting insurrection, REV. STAT. § 5334 (1875), 18 U. S. C. § 4 (1940), and against a conspiracy to overthrow the government or oppose its authority forcibly, REV. STAT. § 5336 (1875), 18 U. S. C. § 6 (1940). A broader provision against advocating overthrow of the government was included in the Alien Registration Act of 1940, 54 STAT. 671, 18 U. S. C. § 10 (1940); see CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) 440–90. Another old law, REV. STAT. § 5440 (1875), 18 U. S. C. § 88 (1940), prohibits a conspiracy to commit any federal offense, if accompanied by any overt act. Many states have similar laws, mostly passed immediately after the World War. These acts are collected in CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) 575–97.

66. See United States v. Dunne, U. S. Dist. Ct. of Minn., Dec. 8, 1941, cited *supra* note 55; State v. Sentner, 230 Iowa 590, 298 N. W. 813 (1941), 36 ILL. L. REV. 357; State v. Boloff, 138 Ore. 568, 4 P. (2d) 326 (1931), *rehearing denied*, 138 Ore. 610, 7 P. (2d) 775 (1932).

67. See Herndon v. Lowry, 301 U. S. 242 (1937). Moreover, a conflict of authority exists in the federal courts whether these laws cover the revolutionary parties; see Note (1938) 48 YALE L. J. 111.

68. 54 STAT. 671, 18 U. S. C. § 10(a)(3) (1940); the state statutes are collected in CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) 575–97.

69. See note 20 *supra*.

70. Although such a provision was declared invalid on its face in Stromberg v. California, 283 U. S. 359 (1931), many similar clauses are still in existence, and may be invoked to punish criticism about the war. See for example MONT. REV. CODE ANN. (1935) § 10737; IOWA CODE (1939) § 12904 (hostility or opposition to government); WASH. REV. STAT. ANN. (Rem. 1932) § 2564 (anything tending to encourage disrespect for law).

punishing interference with free discussion by invoking the old Civil Rights Act.[71] Now that speech has been protected against state action, the federal government could proceed under this act against state officials who participate in a denial of the right to speak.[72] But the majority of attacks upon unpopular speakers are led by private individuals, and traditionally the federal government has been denied power to prosecute in such instances. In the Reconstruction era the Fourteenth Amendment was held not to provide negroes with national rights protected against private interference.[73] Since that time federal rights guaranteed against individual interference have afforded protection only to those involved in obviously federal functions, such as participation in federal elections,[74] or detention in the custody of a federal marshal.[75] The lack of federal power to discipline individual vigilantes was described by a responsible official of the Department of Justice as "the one serious gap in law enforcement" during the last war.[76] Yet, as the Fifth Circuit Court of Appeals indicated in 1938,[77] the weight of precedent under the traditional construction of the Fourteenth Amendment makes it unlikely that the courts will themselves be willing to protect free discussion against vigilante action by creating a new federal right of free speech safeguarded from infringement by individuals. While last year the Supreme Court majority adopted a liberal construction of the Civil Rights Act in *United States v. Classic*,[78] the expanded concept of federal rights and federal functions remained within the traditional field of federal elections. Perhaps Congress could punish private deprivation of free speech by declaring that full discussion of national problems is necessary to the functioning of the federal government.[79] Yet in any case, wartime criminal prosecutions for excesses

71. REV. STAT. §§ 5508, 5510 (1875), 18 U. S. C. §§ 51, 52 (1940).

72. Compare the prosecution of a policeman for the use of third-degree methods incompatible with the federal guarantee of a fair trial, in United States v. Sutherland, 37 F. Supp. 344 (N. D. Ga. 1940). If state officials were held responsible for passive failure to protect speakers, the policy might prove more effective.

73. Civil Rights Cases, 109 U. S. 3 (1883) (equal treatment in carriers and inns).

74. *Ex parte* Yarbrough, 110 U. S. 651 (1884).

75. Logan v. United States, 144 U. S. 263 (1892). An alternative test is suggested in this case; federal protection can be provided against individual infringement of rights created by the Constitution and dependent on its existence, but not for the natural rights merely recognized by the Constitution.

76. O'Brian, *Civil Liberty in War Time* (1919) 42 PROC. N. Y. STATE BAR ASS'N 275, 293.

77. Powe v. United States, 109 F. (2d) 147 (C. C. A. 5th, 1940), *cert. denied*, 309 U. S. 679 (1940), 40 COL. L. REV. 902, 35 ILL. L. REV. 342. United States v. Cruikshank, 92 U. S. 542 (1875), refused to extend federal protection against infringements of free speech by individuals; and a dictum offering such protection where the speech involves federal functions has been ignored. *Id.* at 552.

78. 313 U. S. 299 (1941).

79. See Powe v. United States, 109 F. (2d) 147, 151 (C. C. A. 5th, 1940), *cert. denied*, 309 U. S. 679 (1940). The discussion of state affairs could perhaps likewise be protected by legislation to implement the federal guarantee of a republican govern-

of patriotism are unlikely except in extreme cases. The active national protection of free discussion under the Civil Rights Act will thus probably be limited to informal warnings backed by the threat of prosecution.

Relation Between State and Federal Jurisdiction

The need for encouraging or limiting discussion of national policies in international relations and war is a single national problem that can only be appreciated by the central government. Moreover, the outlook of state and local authorities is apt to be dominated by narrow vision and local partisanship. In the last war, for example, a federal policy of conciliating minority labor groups, to capture their sympathy for the war effort and increase their productivity, was seriously embarrassed by the repressive policy of majority groups in several states.[80] A policy of local cooperation with the federal government[81] may provide a check on the severe provisions in some state legislation,[82] and the more extreme statutes may eventually be declared unconstitutional by the Supreme Court. Moreover, in a few recent cases the federal courts have intervened by injunction and habeas corpus to prevent the unconstitutional application of state laws restricting speech.[83] Yet, since the state's prosecuting officials are usually autonomous, the existence of state sedition laws puts free discussion at the mercy of county

ment, U. S. Const., Art, IV, § 4. See also U. S. Const. Amend. XIV, § 5, for a possible untapped source of power.

80. Under the stricter Minnesota statute in the World War (Minn. Laws 1917, c. 463), widespread prosecutions were instituted against members of the radical farmers' Non-Partisan League, and especially against its President Townley and Secretary Gilbert. John Lord O'Brian, then Assistant to the Attorney General, remarked of this law that "the result of its adoption increased discontent." O'Brian, *Civil Liberty in War Time* (1919) 42 Proc. N. Y. State Bar Ass'n 275, 296 (contains an extended discussion of this problem).

81. See unpublished speech by Wendell Berge, Chief of the Criminal Division of the U. S. Dep't of Just., Dec. 14, 1941.

82. About a dozen states have attempted to protect federal military activities by passing statutes similar to or broader than the federal laws. The most extensive provisions are in Nebraska, but Minnesota, Montana, and Louisiana have a wide range of prohibitions. Three states have copied the Federal Espionage Act and four more contain provisions against obstructing enlistment. Three specifically protect all auxiliary civilian activities. Two more prohibit any expression of disloyalty, while five vaguely forbid any "sedition". Six others resemble the Federal Sedition Act of 1918 by punishing abuse of form of government, the army or flag. These statutes are collected in Chafee, Free Speech in the United States (1941) 575, 578-97.

83. Hague v. C. I. O., 307 U. S. 496 (1939) (injunction). Exhaustion of appeals in the state courts is usually a prerequisite. See Trent v. Hunt, 39 F. Supp. 373 (S. D. Ind. 1941) (injunction refused by three-judge court); *In re* Morgenstern, U. S. Dist. Ct. of Tex., Sept. 19, 1941 (habeas corpus granted); *cf. Ex parte* Starr, 263 Fed. 145 (D. Mont. 1920).

attorneys and police court judges.[84] Enforcement of the declared national policy of preserving free discussion in wartime thus runs squarely into the dual sovereignty inherent in a federal system.

In the allocation of governmental powers between nation and states, the federal powers are traditionally distinguished from the areas of concurrent state and federal jurisdiction.[85] Some federal powers are called exclusively national,[86] but others may be delegated to the states.[87] In a field of concurrent jurisdiction, an exercise of the federal power usually supersedes and suspends similar state laws;[88] yet occasionally the state may continue to retain concurrent jurisdiction.[89] When Congress has occupied and suspended state legislation in part of a field of concurrent power, the jurisdiction of the remainder of the field has been determined by two tests: the objective need of uniformity according to the type of activity regulated,[90] and the

84. It is not at all surprising that such administration during the World War of the state statutes cited *supra* note 82 brought stringent restrictions on free discussion. Several convictions involved private conversations, State v. Rempel, 143 Minn. 50, 172 N. W. 888 (1919) (*rev'g* conviction); or refusals to make financial contributions, under vigilante pressure, State v. Ludemann, 143 Minn. 126, 172 N. W. 887 (1919) (*rev'g* conviction); Gerdes v. State, 104 Nebr. 35, 175 N.W. 606, 1023 (1919) (*rev'g* conviction); and *cf.* State v. Gibson, 189 Iowa 1212, 174 N. W. 34 (1919). See also *Ex parte* Starr, 263 Fed. 145 (1920) (involving Montana conviction for refusal to kiss the flag, under mob orders); State v. Freerks, 140 Minn. 349, 168 N.W. 23 (1918) (counts for remarks that socks knitted would never reach the soldiers, and that the Star Spangled Banner was "rotten doggerel"). Yet, except in Minnesota and Montana, repression by state governments operated largely through the threat of prosecution; reported appeals are remarkably few, and in over half of these the convictions were reversed.

85. See *Ex parte* McNeil, 13 Wall. 236, 240 (U. S. 1871) (interstate commerce). See generally Grant, *The Scope and Nature of Concurrent Power* (1934) 34 COL. L. REV. 995.

86. See U. S. CONST., Art. I, §§ 8, 10; and *cf.* Wabash, St. L. and Pac. Ry. v. Illinois, 118 U. S. 557 (1886) (interstate commerce); Passenger Cases, 7 How. 283 (U. S. 1849) (foreign commerce); Davidowitz v. Hines, 30 F. Supp. 470 (M. D. Pa. 1939), *aff'd on other grounds,* 312 U. S. 52 (1941) (alien registration). The obviously exclusive federal functions, such as the war power, have rarely been the subject of litigation; but most powers are either concurrent or may be delegated to the states. See Grant, *supra* note 85, at 1008–09.

87. See Clark Dist. Co. v. Western Md. R.R., 242 U. S. 311 (1917) (interstate commerce); *In re* Heff, 197 U. S. 488 (1905) (Indian affairs).

88. U. S. CONST., Art. VI, § 2; Oregon-Wash. R.R. v. Washington, 270 U. S. 87 (1926) (agricultural quarantine); see Grant, *supra* note 85, at 1009 *et seq.* For examples of state regulations, before any federal action, in a field of concurrent jurisdiction, see Atlantic Coast Line v. Georgia, 234 U. S. 280 (1914) (interstate commerce); Halter v. Nebraska, 205 U. S. 34 (1907) (protection of the flag).

89. Gilbert v. Minnesota, 254 U. S. 325 (1920) (sedition); *cf.* Sexton v. California, 189 U. S. 319 (1903) (extortion).

90. See *Ex parte* McNeil, 13 Wall. 236, 240 (U. S. 1871) (interstate commerce); Cooley v. Board of Wardens, 12 How. 299, 319 (U. S. 1851) (interstate commerce).

subjective intent of Congress, either to leave the rest of the field free[91] or to allow the states to continue additional regulations.[92]

The state's activities in connection with the exclusively national power to wage war have involved the exercise of various types of powers. It is hardly profitable to debate whether the states as separate sovereignties are also at war with the foreign enemy. In many activities the state organization acts in a federal capacity under federal direction. Where a definite local interest arises, as in the protection of property from sabotage,[93] the states retain the power of separate action. If a real danger of a breach of the peace arises from speech, a state can take the speaker into protective custody. Moreover, the states may often act spontaneously under a loosely-defined power to aid the federal government's war effort. Thus a state's power to encourage national patriotism by protecting the flag from misuse, when there was no federal legislation in the field, was upheld in *Halter v. Nebraska*.[94] After its citizens have entered the national army, a state may likewise provide additional pay for them.[95] Yet in two situations definite limits have been set upon the state's power to decide how to help federal policy. No state legislation in a concurrent field can stand if it comes into direct conflict with federal policy under an extension of the war power; the entrance of superior federal power into the field suspends all state jurisdiction.[96] Second, in the punishment of offenses against the national military effort, state jurisdiction has traditionally been sharply restricted. Treason in a national war has thus been recognized as exclusively a matter of federal jurisdiction, and not an offense against a state.[97] In an early case a divided Supreme Court apparently indicated that, after the federal government has partly occupied the field by providing penalties, the states cannot continue to punish disobedience to a national call for the militia.[98] Under these

91. Cloverleaf Butter Co. v. Patterson, 62 Sup. Ct. 491 (U. S. 1942) (pure food); Northern Pac. Ry. v. Washington, 222 U. S. 370 (1912) (interstate commerce).

92. Maurer v. Hamilton, 309 U. S. 598 (1940) (interstate commerce); Savage v. Jones, 225 U. S. 501 (1912) (pure food and drugs).

93. The federal government has recently promoted the passage by the states of a new model act against sabotage. See Warner, *The Model Sabotage Prevention Act* (1941) 54 HARV. L. REV. 602; Pressman, Leider, and Cammer, *Sabotage and National Defense* (1941) 54 HARV. L. REV. 632.

94. 205 U. S. 34 (1907).

95. Gustafson v. Rhinow, 144 Minn. 415, 175 N. W. 903 (1920). *Cf.* VT. LAWS 1941, c. 179.

96. Northern Pac. Ry. v. North Dakota, 250 U. S. 135, 150 (1919). See also Dakota Cen. Tel. Co. v. South Dakota, 250 U. S. 163 (1919).

97. "We think the jurisdiction of the state courts does not extend to the offense of treason against the United States," People v. Lynch, 11 Johns. 549, 553 (N. Y. 1814); *Ex parte* Quarrier, 2 W. Va. 569 (1866).

98. Houston v. Moore, 5 Wheat. 1 (U. S. 1820). Most of the important arguments involved in later discussions under the war power appeared in this case.

analogies, if national policy seeks to protect a certain type of criticism about the war, such remarks could not be made an offense against a state.

In the World War, several states sought to protect national unity by passing sedition statutes similar to or broader than the Federal Espionage Act. State court decisions followed conflicting interpretations of the relation between state and federal jurisdiction over opposition to the war. In cases overruling municipal prohibitions, a doctrine of exclusive federal jurisdiction was announced.[99] Yet in decisions on state legislation, the courts assumed originally concurrent jurisdiction and suggested several theories — federal occupation of the field superseding all state legislation,[100] continuing concurrent state jurisdiction,[101] and continuing state jurisdiction to pass broader regulations in the remainder of the field.[102] In *Gilbert v. Minnesota*[103] the question split the Supreme Court into four groups. In McKenna's majority opinion, the notion of any possible separation of sovereignties in a unified national effort was swept away as "cold and technical reasoning . . . [that brings] an instinctive and immediate revolt."[104] The doctrine of the state's power to help patriotic effort was taken from *Halter v. Nebraska*, where there was no federal statute, and extended to give the state an almost plenary discretion in attempting to help. Under this theory the state not only retained concurrent jurisdiction in a field occupied by federal statutes, but could also pass broader regulations. The existence of federal legislation in the field was thus in fact irrelevant, and the difference between the state and federal laws was not even noted in the opinion. As in the state decisions, under the theory that no national right of free speech protected against state action was then established, the conflict with national policy was not so apparent.[105] Holmes concurred in the result with the majority, and White dissented on the ground that exercise of the superior federal power

99. *Ex parte* Taft v. Shaw, 284 Mo. 531, 225 S. W. 457 (1920) (vagrancy ordinance used to forbid criticism of the war); New Yorker Staats-Zeitung v. Nolan, 89 N. J. Eq. 387, 105 Atl. 72 (Ch. 1918) (prohibition of German-language newspapers); Star Co. v. Brush, 103 Misc. 631, 170 N. Y. Supp. 987 (Sup. Ct. 1918); Star Co. v. Brush, 172 N. Y. Supp. 661 (Sup. Ct. 1918), *rev'd*, 185 App. Div. 261, 172 N. Y. Supp. 851 (2d Dep't 1918); Star Co. v. Brush, 104 Misc. 404, 172 N. Y. Supp. 320 (Sup. Ct. 1918) (various attempts to exclude specific newspapers).

100. *Ex parte* Meckel, 87 Tex. Cr. 120, 124, 220 S. W. 81, 83 (1919) (reversal on rehearing).

101. State v. Holm, 139 Minn. 267, 166 N. W. 181 (1918); State v. Kahn, 56 Mont. 108, 182 Pac. 107 (1919).

102. State v. Holm, 139 Minn. 267, 166 N. W. 181 (1918); State v. Tachin, 92 N. J. L. 269, 106 Atl. 145 (Sup. Ct. 1919), *aff'd*, 93 N. J. L. 485, 108 Atl. 318 (1919), *app. dismissed*, 254 U. S. 662 (1920).

103. 254 U. S. 325 (1920).

104. *Id.* at 329.

105. The *Gilbert* case in 1920 was the last definite refusal by the Supreme Court majority to declare that free speech was protected against state action. Despite a broad dictum *contra* in 1922 [see Prudential Insurance Co. v. Cheek, 259 U. S. 530, 538, 543 (1922)] this guarantee was announced in Gitlow v. New York, 268 U. S. 652 (1925).

necessarily occupied the whole field and suspended all state action. In a dissent by Brandeis, the whole responsibility under the war power, including determination of the extent of free speech as a necessary part of popular participation in the war, was held to be an exclusive federal function.[100] Likewise, on his alternative theory that free speech is a national right protected against the states, even under concurrent jurisdiction the broader state sedition acts are void for conflict with supreme federal policy.

The recent increasing protection of free speech against state laws[107] has brought constitutional interpretation into direct opposition to McKenna's theory that the states possess unlimited autonomy and discretion in cooperating with national policy. Under the present immediate-and-serious danger test, many of the broader state sedition statutes are probably unconstitutional on their face. Moreover, in annulling a state Alien Registration Act, the broad language of *Hines v. Davidowitz*[108] has indicated a more radical line of attack upon all state sedition legislation. Under this theory, where the powers exercised are incidental to a supreme national power, as in international affairs, and the regulations involve restrictions on civil liberties, a strong presumption arises against concurrent or broader state jurisdiction. In such a situation, any Congressional legislation occupying part of the field will be presumed to intend suspension of similar or broader state legislation and the establishment of a uniform national policy. As the dissenting opinion pointed out, so strong an inference of national suspension of state laws is almost unique in the allocation of concurrent state and federal jurisdiction.[109] Under the analogy of the *Hines* case, the partial limitations imposed by Congress upon discussion of the war may supersede all state jurisdiction for similar or broader restrictions. If in a state sedition case the Supreme Court should declare that control of discussion about the war is part of the national war power, no state legislation punishing criticism of the war may exist, at least without express Congressional authorization.[110] The respon-

106. 254 U. S. 325, 336–39. Yet later in the opinion he indicated that Congress could delegate this federal power to the states, by expressly authorizing state laws. *Id.* at 341–42.

107. See note 105 *supra.*

108. 312 U. S. 52 (1941). In Davidowitz v. Hines, 30 F. Supp. 470 (M. D. Pa. 1939), a three-judge federal court invalidated the state act as encroaching on an exclusive federal field. But during the appeal, Congress occupied the field by passing a less restrictive act, and the Supreme Court reserved the question of an exclusive federal power.

109. Among the cases cited in favor of the contrary presumption upholding state jurisdiction is Gilbert v. Minnesota, 254 U. S. 325 (1920); see Hines v. Davidowitz, 312 U. S. 52, 80 (1941).

110. If jurisdiction over sedition were held to be an exclusive federal power, as with treason [see note 97 *supra*], the possibility of hasty and ill-considered Congressional authorization to the states in a time of crisis would be removed. Yet the Supreme Court has recently shown a preference for interpretation in terms of Congressional

sibility and the power to implement the full national policy will then be placed squarely upon the national Government.

Institutional Channels of Communication

Since the recent development of the great institutional means of communication — the press, radio, motion pictures and mails — intelligent public participation in the war effort has become dependent upon a constant flow of information about military and economic developments. Although individual speech is necessarily restricted only by the threat of subsequent punishment, a prior censorship may be imposed to prevent the publication of military information unknown and valuable to the enemy. While such control will be exerted largely through secrecy at the source and censorship of foreign cables,[111] the new Office of Censorship has instituted a voluntary press censorship and has indicated the types of military information to be withheld at all times.[112] Regulation of radio and motion pictures can be implemented through use of the elaborate codes of industrial self-government;[113] and in radio the federal government retains extreme sanctions by powers of licensing[114] and of taking over any station.[115] The survival of local censorship of motion pictures may involve a conflict of state and federal jurisdiction,[116] but any problems that arise will probably be settled by cooperation with the Office of Censorship.

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intent rather than lack of power. See Hamilton and Braden, *The Special Competence of the Supreme Court* (1941) 50 YALE L. J. 1319, 1357–67. In either case, some states would probably attempt to retain jurisdiction by expanding the concepts of breach of the peace and disorderly conduct. Such restrictions can only be controlled by federal judicial review in each case. *Cf.* Cantwell v. Connecticut, 310 U. S. 296 (1940).

111. Authorized by Pub. L. No. 354, 77th Cong., 1st Sess. (Dec. 18, 1941) § 303, and delegated to the Office of Censorship on the following day, 6 FED. REG. 6625 (1941).

112. This censorship code proscribes the publication of information about troops and ships, casualty lists, munitions output and weather conditions. See N. Y. Times, Jan. 15, 1942, p. 12, col. 1.

113. Thus the CODE OF THE NATIONAL ASS'N OF BROADCASTERS (1939) was supplemented on the outbreak of war by special regulations which forbade broadcasting vital military information and any unconfirmed rumors. See N. Y. Times, Dec. 22, 1941, p. 14, col. 6. For the code governing the motion picture industry, see ERNST & LINDEY, THE CENSOR MARCHES ON (1940) 317–28; Comment (1939) 49 YALE L. J. 87, 102 *et seq.*

114. 48 STAT. 1081 (1934), 47 U. S. C. § 301 (1940).

115. The power derived from 48 STAT. 1104 (1934), 47 U. S. C. § 606(c) (1940), was delegated on Dec. 12, 1941, to the Defense Communications Board. See 6 FED. REG. 6367 (1941). For the further authority granted on the outbreak of war, see Pub. L. No. 413, 77th Cong., 2d Sess. (Jan. 26, 1942); Comment (1942) 51 YALE L. J. 629, 646–48. Yet it is unlikely that these powers will be widely used. See N. Y. Times, Dec. 24, 1941, p. 10, col. 8.

116. For the confusion of conflicting authority over motion pictures in the last war, see MOCK, CENSORSHIP 1917 (1941) 172–89. State prohibition of war movies approved by the federal government would involve the jurisdictional issues discussed on pp. 810–15

A possibility of severe restriction of discussion in the press is latent in the traditional "practically plenary" power to exclude matter from the mails.[117] The original view that a refusal of the mail facilities could not interfere with freedom of the press, because other means of circulation could be found,[118] would not be seriously argued now.[119] The courts have shown a tolerant attitude towards statutory prohibitions of the use of the mails by fraudulent and lottery schemes.[120] To rationalize such exclusions, the broad dictum has developed that use of the mails, and especially of the subsidized second class,[121] is a privilege that Congress may grant or withdraw at will for any reason.[122] Similarly, under these statutes the courts have allowed the sanction to be applied in informal proceedings by administrative officials, whose findings are in fact final.[123] A provision in the 1917 Espionage

supra. But Eureka Prod. Inc. v. Lehman, 17 F. Supp. 259 (S. D. N. Y. 1936), *aff'd*, 302 U. S. 634 (1937), indicates that a decision upholding federal supremacy in this situation would require over-ruling Mutual Film Corp. v. Industrial Comm. of Ohio, 236 U. S. 230 (1915), which approved state censorship of movies and rejected contentions based upon free speech and the burden on interstate commerce. See generally Comment (1939) 49 YALE L. J. 87.

117. United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U. S. 407, 411 (1921).

118. *Ex parte* Jackson, 96 U. S. 727 (1877); see Masses Publishing Co. v. Patten, 246 Fed. 24, 27 (C. C. A. 2d, 1917).

119. The significance of free circulation through the mails for the guarantee of a free press is indicated by the fact that over one billion pounds of mail were carried under the second class privilege in the last fiscal year. See REP. POSTMASTER GEN. (1941) 32. The great metropolitan newspapers are now widely circulated by mail; and the smaller periodicals, which are more apt to be affected by a wartime control of the mails, are often wholly dependent on the postal facilities for access to their scattered audience. *Cf.* Grosjean v. American Press Co., 297 U. S. 233, 249 (1936).

120. *Ex parte* Jackson, 96 U. S. 727 (1877) (lottery); *In re* Rapier, 143 U. S. 110 (1892) (lottery); Public Clearing House v. Coyne, 194 U. S. 497 (1904) (fraud).

121. See Lewis Publishing Co. v. Morgan, 229 U. S. 288 (1913). Yet the second class rate is in practice essential for free circulation. *Cf.* note 119 *supra*. Without judicial review of the rulings of the Postmaster General, "that official had the power to practically destroy any magazine or newspaper by merely withdrawing the second class privilege from such magazine or periodical." Lewis Publishing Co. v. Wyman, 152 Fed. 787, 793 (E. D. Mo. 1907).

122. "There can be no doubt that the United States may prohibit the carriage by mail of such things as it pleases." American Civ. Lib. Union v. Kiely, 40 F. (2d) 451, 452 (C. C. A. 2d, 1930). See Gitlow v. Kiely, 44 F. (2d) 227, 230 (S. D. N. Y. 1930), *aff'd*, 49 F. (2d) 1077 (C. C. A. 2d, 1931), *cert. denied*, 284 U. S. 648 (1931). For the background *cf.* cases cited *supra* note 120. See Deutsch, *Freedom of the Press and of the Mails* (1938) 36 MICH. L. REV. 703; Legis. (1938) 38 COL. L. REV. 474.

123. Although partly justified by practical necessity, the rather summary administrative procedure usually adopted by the Post Office Dep't has been widely criticized. On fraud orders, see *Monograph of Attorney General's Committee on Administrative Procedure*, pt. 13, SEN. DOC. No. 10, 77th Cong., 1st Sess. (1941) 34-87; Note (1941) 50 YALE L. J. 1479. On revocation of second class permits, see *Id.* at 4-33. Yet the

Act excluding from the mails all matter that violated the Act[124] thus gave the Post Office final power to restrict severely the circulation of any paper.[125] Although a statement in the Congressional debates indicated an intent to limit the exclusion to the single issue found to violate the Act,[126] the Department excluded one issue of Victor Berger's Socialist newspaper, and then invoked the requirement of regular mailing in another statute defining the second class privilege[127] in order to exclude all future issues from the cheaper rate. Over vigorous dissents by Holmes and Brandeis, the Supreme Court majority upheld the Department by a presumption that similar violations would continue.[128] During the recent development of a presumption favoring free discussion in various forms, the theory of a plenary postal power has not been disturbed. The exclusion of one issue from the mails need not raise the separate question of the continuance of a second class permit. Moreover, the exclusion of newspapers from an important means of circulation should now be recognized as an interference with freedom of

courts have generally refused to reverse such determinations, unless they are "clearly wrong." See Leach v. Carlile, 258 U. S. 138 (1922).

124. 40 STAT. 230 (1917), 18 U. S. C. § 343 (1940). Note the curious expectation of full judicial review expressed by Chairman Webb of the House Judiciary Committee, who was in charge of the bill, in 55 CONG. REC. 1836 (1917).

125. Since their lawyers were selected for other routine work and not for their views on civil liberties, the Post Office Dep't issued some remarkable convictions for violation of the Espionage Act. A history book by James Harvey Robinson was proscribed for not being sufficiently anti-German; VEBLEN, IMPERIAL GERMANY AND THE INDUSTRIAL REVOLUTION (1915) was recommended for general reading by George Creel, and then excluded from the mails. See MOCK, CENSORSHIP 1917 (1941) 145-71. One issue of THE NATION was excluded for criticizing Samuel Gompers, but President Wilson intervened to reverse this decision. See VILLARD, FIGHTING YEARS (1939) 327, 354. Apparently there was no cooperation with the Dep't of Justice to enforce a uniform national policy. See O'Brian, *Civil Liberty in War Time* (1919) 42 PROC. N. Y. STATE BAR ASS'N 310-11. The Post Office Dep't has not indicated its policy in the present war.

126. The same title of the Espionage Act excluded from the mails all written or printed matter that violated the Act or was treasonable or anarchistic; and these provisions were vigorously debated on several days. The modification made in the House Judiciary Committee was thus described by Representative Volstead: ". . . The only power we left in the bill over the mails gives the postmasters the right to exclude treasonable or anarchistic matter — exclude that particular edition, the particular article." 55 CONG. REC. 1607 (1917). No material change in this respect was indicated in the conference report, 55 CONG. REC. 3130, 3307 (1917).

127. 20 STAT. 359 (1879), 39 U. S. C. § 226 (1940).

128. United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U. S. 407 (1921). For criticism of the "privilege" doctrine in this case, see also FRANKFURTER, MR. JUSTICE HOLMES AND THE CONSTITUTION (1938) 57; *Monograph of Attorney General's Committee on Administrative Procedure, supra* note 123, at 2-4, 15, 29. For other wartime cases see Burleson v. United States *ex rel.* Workingmen's Cooperative Publishing Co., 274 Fed. 749 (App. D. C. 1921); Jeffersonian Publishing Co. v. West, 245 Fed. 585 (S. D. Ga. 1917).

the press that requires constitutional protection[129] under serious judicial review.

CONTROL OF FOREIGN INFLUENCES

In wartime special regulations are necessary over the activities of persons suspected of sympathy and communication with foreign governments. A little-used old statute forbids any unauthorized correspondence with a foreign government, to influence its policy toward the United States.[130] And more important, the collection and transmission of military information to the enemy will be summarily punished.[131] Although the constitutional definition of treason includes "adhering to" an enemy,[132] the experience of the last war indicates that the traditional strict construction of this clause will not permit its use to punish speech criticizing the war.[133]

The propaganda of foreign countries, seeking to undermine American solidarity or to secure American support for their own post-war aims, requires very different treatment. By forcing disclosure of the sources of such ideas, Congress has sought to implement their evaluation under the normal democratic process of free discussion. The original MacCormack Act of 1938[134] required public registration of all agents of foreign governments or groups, but the law was not vigorously enforced. A series of amendments passed after the outbreak of war[135] have recently been vetoed, with a recommenda-

129. "The struggle for the freedom of the press was primarily directed against the power of the licensor." Lovell v. City of Griffin, 303 U. S. 444, 451 (1938).

130. REV. STAT. § 5335 (1875), 18 U. S. C. § 5 (1940). A plea for expanded use of this statute may be found in Brabner-Smith, *Subversive Propaganda, The Past and the Present* (1941) 29 GEO. L. J. 809, 812, n. 10. See also 40 STAT. 226 (1917), 22 U. S. C. § 231 (1940).

131. Spies may be punished in civil courts under the Espionage Act, 40 STAT. 217 (1917), 50 U. S. C. §§ 31–32 (1940); or in wartime by court-martial, under 41 STAT. 804 (1920), 10 U. S. C. § 1554 (1940).

132. U. S. CONST., Art. III, § 3; enacted into statute in REV. STAT. §§ 5331–33 (1875), 18 U. S. C. §§ 1–3 (1940).

133. Treason usually involves insurrection, espionage or supplying munitions to aid the enemy. See Warren, *What is Giving Aid and Comfort to the Enemy?* (1918) 27 YALE L. J. 331, for a classification of possible offenses. Several cases have definitely indicated that verbal opposition to the war alone could not be treason. See Charge to the Grand Jury, 30 Fed. Cas. No. 18, 271 (S. D. N. Y. 1861). Several unsuccessful prosecutions were brought during the last war to test this weapon against speech. In United States v. Werner, 247 Fed. 708 (E. D. Pa. 1918), the court overruled a demurrer to permit evidence on whether the words spoken were part of a treasonable act; but the prosecution was later dismissed for lack of such proof. *Cf.* Schaefer v. United States, 251 U. S. 466 (1920). Since there have been no convictions for treason in over one hundred years, prosecutions for discussion about the present war will probably not attempt to use this weapon. See generally REP. ATT'Y GEN. (1918) 41–42.

134. 52 STAT. 631 (1938), 22 U. S. C. §§ 611–16 (1940).

135. See 87 Cong. Rec., Dec. 19, 1941, at 10323–26.